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No. 82-287

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF ARIZONA *et al.*,
Petitioners,

vs.

ASH GROVE CEMENT COMPANY, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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SUPPLEMENTAL STATEMENT OF THE CASE

In addition to the facts set forth in the "Statement of the Case" at pages 2-7 of this "Petition For A Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit," the following facts are relevant to the timeliness issue raised in respondents' brief in opposition. At the January 4, 1982 oral argument on the mandamus petition from Judge Muecke's recusal order (which was accepted by the Ninth Circuit when petitioners' alternate jurisdictional grounds under 28 U.S.C. §§ 1291 and 1292(b) were rejected), the Panel raised the question of the propriety of jurisdiction under 28 U.S.C. §§ 1291 and 1292(b), and inquired why petitioners had not requested reconsideration of the jurisdiction rulings. At that

hearing, petitioners so moved orally, and on January 11, 1982 petitioners filed a written motion for leave to file a petition for reconsideration and attached a copy of the petition.

On January 22, 1982, while petitioners' motion for leave to petition for reconsideration was pending before the Ninth Circuit, an application for enlargement of time in which to file a petition for writ of certiorari on the jurisdictional issues was filed with this Court. On January 25, 1982, that application was denied (Appendix III to Brief in Opposition to Petition For Writ of Certiorari). The very next day, the Ninth Circuit entered an Order (Petition Appendix F): (1) stating that an "opinion expanding the views summarily expressed in the Order filed October 30, 1981" would be filed the next day, (2) ordering the petition for reconsideration lodged with the Court, and (3) granting petitioners leave to file a petition for rehearing within seven days of the filing of the Court's opinion. The extended opinion, with an eight page dissent, was filed January 27, 1982. On February 3, 1982, petitioners timely filed a petition for rehearing and suggestion for rehearing *en banc* based on the extended opinion in accordance with the Circuit Court's Order. On April 15, 1982, the Ninth Circuit issued an "Amendment of Opinion and Denial of Rehearing" (Petition Appendix G) which denied the petition for rehearing and rejected the suggestion for rehearing *en banc*.

Since five of the Justices of this Court have stockholdings similar to Mrs. Muecke's, the identical recusal issue before the Ninth Circuit on the petition for writ of mandamus would be presented by a petition for a writ of certiorari on the jurisdiction issues. Therefore, on June 2, 1982, petitioners requested an extention of time in which to file such a petition to give the Ninth Circuit more time in which to rule. That request was granted by Justice Rehnquist to the extent of allowing a thirty-two day extension to Sunday, August 15, 1982. (Appendix L, attached hereto.) As the Ninth Circuit still had not ruled on the mandamus petition by July 24, 1982, petitioners requested an additional extension of twenty-eight days (thus totaling the sixty days permitted by this Court's rules) in which to file a petition for a writ of certiorari on the jurisdiction issues, which request was denied on August 2, 1982. On August 16, 1982,

petitioners timely filed this petition for a writ of certiorari from the Ninth Circuit's jurisdiction rulings which were final on April 15, 1982.

REASONS WHY THE WRIT SHOULD BE GRANTED

I. The Petition Was Timely Filed

Prior to January 28, 1982, the date by which a petition for writ of certiorari for review of the Ninth Circuit's October 30, 1981 Order would have been due, the Circuit Court granted petitioners' motion for leave to petition for reconsideration. By ordering the petition for reconsideration lodged and inviting the filing of a new petition for rehearing, the Circuit Court suspended the finality of and put at issue both its October 30, 1981 summary Order and the January 27, 1982 extended Opinion. The Ninth Circuit's rulings on these issues were not resolved until April 15, 1982. That is the first date on which a petition for a writ of certiorari was proper. *See Bowman* v. *Lopereno,* 311 U.S. 262, 266 (1940), wherein the Court stated (footnotes omitted, emphasis added):

> The filing of an untimely petition for rehearing *which is not entertained or considered on its merits,* or a motion for leave to file such a petition out of time, *if not acted on or if denied* by the trial court, cannot operate to extend the time for appeal. *But where the court allows the filing and, after considering the merits, denies the petition, the judgment of the court as originally entered does not become final until such denial, and the time for appeal runs from the date thereof.*

See also, United States v. *Healy,* 376 U.S. 75, 77-80 (1964); *Forman* v. *United States,* 361 U.S. 416, 426 (1960); *Pfister* v. *Northern Illinois Finance Corporation,* 317 U.S. 144, 149-150 (1942); *Wayne United Gas Co.* v. *Owens-Illinois Glass Co.,* 300 U.S. 131, 137 (1937); and R. Stern & E. Gressman, *Supreme Court Practice,* § 6.3 (5th ed. 1978).

Here, the Circuit Court considered the merits of petitioners' motion for rehearing and modified the October 30, 1981 Order in the April 15, 1982 "Amendment of Opinion and Denial of Rehearing" (Appendix G). The ninety day period for filing a petition for a writ of certiorari began to run from April 15, 1982 and would have expired on July 14, 1982.

However, on June 4, 1982 petitioners filed a motion to extend time to file a petition for certiorari. This motion was timely filed a full forty days before expiration of the period available to petition for a writ of certiorari. Although respondents filed an opposition setting forth the same timeliness arguments made now, that motion was granted without a caveat as to jurisdiction, and the date for filing a petition for a writ of certiorari was extended until Sunday, August 15, 1982. This petition was filed and endorsed by the Supreme Court Clerk on the next business day, August 16, 1982.

Respondents rely upon *FTC* v. *Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206 (1952), for the proposition that the petition here was untimely filed. However, this Court repeatedly emphasized that *Minneapolis-Honeywell* did not concern the filing of a motion for reconsideration, or the Circuit Court's acceptance of an application to file a motion for reconsideration:

> The [Petitioner] filed no such petition [for rehearing].

Id. at 208. And:

> [T]he memorandum was labeled neither as a petition for a rehearing nor as a motion to amend the previous judgment, and in no manner did it purport to seek such relief. On the contrary, the [Petitioner] indicated that it was quite content to let the Court of Appeals' decision . . . stand undisturbed.

Id. at 210.

Since the Ninth Circuit chose to lodge petitioners' reconsideration petition, *invited* the filing of a new rehearing petition and then considered the petition on the merits, the rule enunciated in *Bowman* v. *Lopereno, supra,* controls. As stated by R. Stern & E. Gressman, *Supreme Court Practice,* § 6.3 at 399 (5th ed. 1978):

> If rehearing is sought in the court below, there is no absolute certainty that the judgment below will not be altered. Only when there is such certainty can the judgment properly be made the subject of a petition for certiorari. And thus it is that the time for petitioning for certiorari commences on the date when certainty and finality attach to the action taken by the lower court. Where rehearing has been sought, that date is the one on which rehearing was denied.

Similarly here, once the Ninth Circuit granted petitioners leave to file a petition for rehearing, any petition for a writ of certiorari before the Circuit Court ruled on the rehearing petition would have been premature. It is for that reason that petitioners properly filed their petition for a writ of certiorari after April 15, 1982, when the Ninth Circuit affirmed and amended its October 30, 1981 and January 27, 1982 rulings, and not by January 29, 1982 as respondents assert was required.

Having timely filed this petition for a writ of certiorari, petitioners respectfully request that this Court determine whether it can convene a quorum consistent with 28 U.S.C. § 455(b)(4) so that it may rule upon this petition and accompanying "Motion For Relief From Compliance With Certain Provisions of Supreme Court Rules 19.3, 21.1(b), 28.1 and 28.3." As respondents implicitly concede,[1] a federal judge or justice is obligated to individually evaluate his or her capacity to sit without regard to whether a similar recusal issue is

[1] *See* Brief in Opposition to Petition For Certiorari at 12-13. Compare the first and third sentences of the second paragraph on pg. 12 with the last sentence of that paragraph (which continues onto page 13). A similar inconsistency is present in respondents' argument at pg. 8 regarding the Ninth Circuit's ruling on Section 1292(b) jurisdiction. In the first paragraph on pg. 8 they state that the denial of Section 1292(b) jurisdiction was based upon a finding that a recusal question cannot be controlling, since "*no party* to litigation necessarily has a protectable interest in . . . a particular judge. . . ." (Emphasis added.) However, in the next paragraph respondents assert that the Ninth Circuit's ruling does not conflict with other circuits permitting Section 1292(b) review of recusals because it turned on "the particular facts and circumstances" of this case. It is noteworthy that respondents do not reveal how the facts and circumstances here distinguish it from the Third, Fourth, Sixth and Tenth Circuit precedent.

pending elsewhere. Such determination here will require each justice owning stock in a class member to consider the substantive issues resolved in Judge Muecke's recusal Order totally independent of the mandamus proceeding before the Ninth Circuit. Petitioners agree with respondents that proper consideration will require full briefing of the recusal issue to this Court.[2]

II. This Petition Should Be Held For Consideration With No. 82-483.

Petitioners respectfully direct this Court's attention to their "Petition For A Prejudgment Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit" in *State of Arizona, et al.* v. *United States District Court For the District of Arizona*, No. 82-483, October Term, 1982. No. 82-483 requests prejudgment review of the recusal issue in the context of the mandamus proceeding. Petitioners respectfully suggest that because identical recusal questions are presented, this Petition should be held for consideration and consolidated with No. 82-483 after the real parties-in-interest there (respondents here) file their brief in opposition on October 18, 1982.

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[2] *Id.* at 14 n.22.

CONCLUSION

This petition for a writ of certiorari is timely and should be granted.

DATED: September 30, 1982

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APPENDIX L

Supreme Court of the United States

No. A-1052

ARIZONA, *et al.*,
Petitioners

v.

IDEAL BASIC INDUSTRIES, *et al.*

and

ARIZONA, *et al.*,
Petitioners

v.

ASH GROVE CEMENT COMPANY, *et al.*

ORDER

UPON CONSIDERATION of the application of counsel for the petitioners,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled cases be, and the same is hereby, extended to and including August 15, 1982.

/s/ WILLIAM H. REHNQUIST
Associate Justice of the Supreme
Court of the United States

Dated this 7th day of June, 1982.